United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1226

To be argued by
J. RADLEY HEROLD, ESQ.
20 minutes

Bp/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

THE UNITED STATES OF AMERICA,

Appellee,

Docket No. T-7286

- against -

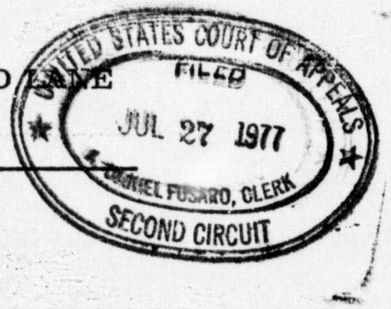
(District Court Docket
No. 76 Crim. 879-CSH)

HAROLD LANE,

Appellant.

----------X

BRIEF OF APPELLANT HAROLD LANE



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STATEMENT OF THE ISSUES

1. Whether the Trial Court erred in denying a hearing in the absence of the trial jury as to the admissibility of statements by the appellant to a law enforcement officer and in ruling admissible such statements and evidence of a prior crime not charged in the Indictment before the trial jury.

2. Whether the Trial Court erred in denying a motion for severance of the tax evasion counts from the Indictment and for a severance of the false filing counts from the Indictment and for a severance of these counts from each other.

3. Whether the Trial Court erred in denying the application of the appellant to submit to the trial jury for their deliberation the lesser included offense and misdemeanor of failure to file an income tax return under section 7203 of Title 26 of the United States Code under the 24th, 25th and 26th counts of the Indictment.

4. Whether the Trial Court erred in denying the application of the appellant for a mis-trial based upon the remarks of the Government Attorney during the rebuttal.

5. Whether the Trial Court erred in denying the application of the appellant to dismiss the Indictment at the end of the Government's case and in denying a similar application for a

dismissal of the indictment and for a new trial notwithstanding the verdict of guilty.

STATEMENT OF THE CASE

The appellant was individually indicted by a Grand Jury of the United States District Court for the Southern District of New York on one count of embezzlement alleging that between March 1973 and up to and including November of 1975 he embezzled in excess of one million dollars collected from the sale of Food Stamp coupons which monies belonged to the United States of America through the Department of Agriculture. The appellant was also charged in the same Indictment with twenty-two counts during the period from February 15, 1974 to October 31, 1975 of unlawfully making a false written statement to the Department of Agriculture to the effect that he had deposited monies with the New York City Federal Reserve Bank on account of the Department of Agriculture with regard to monies collected from the sale of Food Stamps. The appellant was further charged with three counts of income tax evasion for the calendar years of 1972, 1973 and 1974 (App. pp. 4-7).

The appellant was tried before the Hon. Charles S. Haight, Jr., United States District Judge for the Southern District of New York and a jury during January and February of 1977 and found guilty by that jury of all of the charges in the Indictment. On March 25, 1977 the appellant was sentenced to serve a term of up to four

years on each of the counts concerning which he had been found guilty and to pay a fine in the total sum of $10,000.00. (App. p. 12) A stay of execution of that sentence and imposition of that fine has been granted and the appellant is on appellate bail pending the appeal to this court.

STATEMENT OF THE FACTS

A motion was made prior to the commencement of the trial for a severance of the false filing counts from the embezzlement count in the Indictment. A similar motion was also made prior to trial for a severance of all of the tax evasion counts from the remaining counts in the Indictment and pressed in that form to the extent of the severance being pursued at the commencement of the trial more specifically with regard to the twenty-fourth count of the Indictment which charged income tax evasion for the calendar year 1972. These motions for severance (Affidavit in Support of Motion for Severance and Other Relief, pp. 3-4) were denied by the court in a decision rendered before the trial (App. pp. 1-3) and at the commencement of the trial prior to the giving of testimony (App., pp. 13-18).

The appellant was the principal officer in a corporate entity known as Lane Check Cashing, Inc. Testimony was offered by the Government through a White Plains, New York, police detective and an employee of Lane Check Cashing, Inc. that on March 21, 1974 there was an armed robbery at a Lane Check Cashing, Inc. estab-

lishment in that city. A robber purportedly entered the establishment at which time, according to a signed statement taken by the White Plains Police Department from the appellant, the appellant claimed that there was $23,000.00 on hand. It was the contention of the Government that there was only $3,000.00 on hand and that the claim of the appellant with regard to the additional $20,000.00 was false. The Government also introduced evidence to the effect that on a later date the appellant made an insurance claim in the amount of approximately $5,200.00. The White Plains, New York, detective further testified that he did not give any so-called Miranda warnings to the appellant until after he obtained a written statement from the appellant which contained the allegedly false assertions above referred to.

Counsel for the appellant was advised by the Government that such proposed testimony would be introduced by the Government at the trial. In the absence of the trial jury the Government contended that the evidence proposed should be admitted in the case-in-chief on the ground that the false statements of the appellant in relation to the March 1974 of the White Plains check cashing establishment showed a pattern of false statements made routinely and regularly. Counsel for the appellant objected to the admissibility of such testimony on the ground that its probative value, if any,

was far outweighed by the prejudice would could result and on the further ground that the White Plains police detective should have advised the appellant of his rights under the Miranda decision and having failed to do so that such testimony by that detective should not be permitted. A further application was made at the trial for a hearing in the absence of the trial jury on the Miranda grounds to determine the admissibility of such testimony. This application was denied and the Trial Court permitted the testimony into evidence over the objection of trial counsel (App. pp. 19-38 and App. pp. 39-42). The Trial Court did instruct the trial jury as to the purpose of the introduction of such testimony during the course of the trial itself (App. pp. 43 - 46) and during the course of the general instructions to the jury (App. pp. 75-76).

An application was made to the Trial Court to instruct the trial jury as to the lesser included offense and misdemeanor of failure to file income taxes in violation of section 7203 of Title 26 of the United States Code. This request for such an instruction was denied by the Trial Court (App.pp. 61-65 and App. pp. 66-69). During the course of the Rebuttal remarks by the Government Attorney the following comment was made: "First of all, I would just want to say remember that what you are dealing with here is evidence in this case, evidence that you have heard from that witness stand

and evidence and documents that are marked in evidence, not the imaginations of either myself or Mr. Herold with respect to what could have been said, what might have been said, what may be out there in documents some place that have not been brought into this courtroom by the defense case here." (App. pp. 70-71).

A motion for a mistrial on the basis of these comments by the Government Attorney was made by counsel for the appellant and denied by the Trial Court. (App. pp. 72-74). A motion was made at the close of the Government's case for a judgment of acquittal as to each and every count of the Indictment pursuant to Rule 29 of the Federal Rules of Criminal Procedure upon the basis that there was not sufficient evidence before the court and jury to sustain a conviction as to any or all of the counts of the Indictment. That application was denied by the Trial Court (App. pp. 47-60)
and a similar application for a judgment of acquittal notwithstanding the verdict of guilty and for a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure was made after the verdict and denied by the Trial Court. (App. pp. 1-3).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING A HEARING IN THE ABSENCE OF THE TRIAL JURY AS TO THE ADMISSIBILITY OF STATEMENTS BY THE APPELLANT TO A WHITE PLAINS POLICE DETECTIVE AND IN RULING ADMISSIBLE SAID STATEMENTS AND THE EVIDENCE OF A PRIOR CRIME NOT CHARGED IN THE INDICTMENT BEFORE THE TRIAL JURY.

Throughout the course of the trial the Government through its witnesses made continual reference to a "dummy figure" purportedly evidencing an effort by the appellant to conceal the nature of his cash transactions and to demonstrate his opportunity to embezzle money coming into his corporate business. The Government further contended that evidence of a false st ement by the appellant to the White Plains Police Detective in connection with this "dummy figure" insofar as it related to the robbery was further evidence and corroboration (emphasis mine) of all that the Government witnesses had heretofore been testifying to as to the "dummy figure." (App. pp. 19-38 at page 24). The Government urged that this evidence of a purportedly false statement by Lane in connection with the investigation of the robbery in White Plains was relevant both to the embezzlement charge and to the tax evasion

counts as well as to the false filing counts.

The appellant did not take the witness stand in his own behalf and no character witnesses were called on his behalf. The evidence was offered by the Government in its case-in-chief and not to show that the appellant was not a truthful individual. Although the existence of the so-called "dummy figure" was not in issue at the trial it most certainly can be stated that the consequences or meaning of such a "dummy figure" were very much in issue at the trial.

When the Government stated that this evidence would show the opportunity of the appellant to embezzle funds it was really saying that there was a criminal propensity or disposition of the appellant to steal. On this basis alone such evidence was prejudicial to the appellant (Bradley v. United States, 1969, Court of Appeals for the District of Columbia Circuit, 433 F. 2d 1113). In addition, the Government stated that this evidence would corroborate what other witnesses had already said. This appears to be just an example of impermissible bolstering of witnesses or inadmissible self-serving testimony which ought not to have been permitted on that ground alone. Furthermore the evidence of the so-called false statement in the White Plains robbery case was not clear and convincing (see for example United States v. Oliver, 1975, Eighth

Circuit, 525 F. 2d 731, 739-740, Cert. Den. 424 U. S. 1973, 96 S. Ct. 1477, 47 L. Ed. 2d 743 and United States v. Calvert, 1975, Eighth Circuit, 523 F. 2d 895, 906; 424 U. S. 911, 96 S. Ct. 1106, 47 L. Ed. 2d 314). Nor did the anticipated proof of a planned insurance fraud come to any clear and convincing fruition in the evidence (Bullard v. United States, 1968, Fifth Circuit, 395 F. 2d 658).

The White Plains police did not file any criminal charge of falsely reporting an incident against the appellant and the trial jury in the instant case had already heard at least two days of testimony dealing with the "dummy figure". Even if this evidence were to be considered relevant under Rule 404b of the Federal Rules of Evidence it still should have been excluded in that it was a needless presentation of cumulative evidence, a waste of time, a cause of undue delay, and any probative value which it may have had was substantially outweighed by the danger of misleading the jury, confusing the issues and unfair prejudice as against the appellant (Federal Rules of Evidence, Rule 403 and United States v. Bussey, 1970, Court of Appeals for the District of Columbia, 432 F. 2d 1330). Although it appears to be generally proper for proof of another crime not charged as against an accused to be admissible in evidence this is not so where the offer is made to prove the criminal character of

the accused (United States v. Papadakis, 1975, Second Circuit, 510 F. 2d 287, 294, Cert. Den. 421 U. S. 950, 95 S. Ct. 1682, 44 L. Ed. 2d 104).

Although admittedly the appellant was not in custody at the time that he was being questioned by the White Plains Police Detective it was clear that the White Plains Police Detective had prior to the questioning information which led him to believe that the appellant had made or was going to make a false claim as to the amount of monies on hand at the store prior to the robbery. With this in mind that detective was questioning the appellant with the objective of obtaining a statement which would incriminate that appellant in a crime of at least falsely reporting an incident. Under these circumstances that detective should have - which he did not - advised the appellant of his rights under the Miranda decision of the United States Supreme Court and there should have been a testimonial hearing in the absence of the trial jury and before the Trial Court as to whether the statements made by the appellant prior to any such advices should have been allowed into evidence. The Trial Court erred in not granting such an application for a hearing.

POINT II

THE TRIAL COURT ERRED IN DENYING MOTIONS FOR SEVERANCE OF THE TAX EVASION COUNTS FROM THE INDICTMENT AND FOR SEVERANCE OF THE FALSE FILING COUNTS FROM THE INDICTMENT AND FOR A SEVERANCE OF THESE COUNTS FROM EACH OTHER.

At least insofar as the charge of income tax evasion for the calendar year 1972 there appeared to be no relationship as between that charge and the first twenty-three counts of the indictment alleging embezzlement between the period March of 1973 to November of 1975 and the filing of false written statements from the period of February 1974 to October of 1975. Similarly it would appear that there was no relationship as between the filing of false statements counts which began in February of 1974 with the allegation of embezzlement insofar as March of 1973 up to February of 1974. There was even a concern expressed by the Trial Court that there might be some "slip over" as between the count involving the charge of embezzlement and one or another of the tax evasion counts (App. p. 16).

The trial jury may well have in this instance used evidence of one of the crimes charged to infer a criminal disposition on the part of the appellant from which he would be found guilty of the other

crime or crimes charged. Additionally the trial jury may have accumulated the evidence of the various crimes charged and found the appellant guilty when, if the charges had been considered separately, they would have not so rendered a verdict (Drew v. United States, 1964, Court of Appeals for the District of Columbia, 331 F. 2d 85, 88). Such a joinder of offenses against this appellant in this one Indictment was prejudicial to the appellant in his defense as against the charges.

POINT III

THE TRIAL COURT ERRED IN DENYING THE APPLICATION OF THE APPELLANT TO SUBMIT TO THE TRIAL JURY FOR THEIR DELIBERATION THE LESSER INCLUDED OFFENSE AND MISDEMEANOR OF FAILURE TO FILE AN INCOME TAX RETURN UNDER SECTION 7203 OF TITLE 26 OF THE UNITED STATES CODE UNDER THE 24th, 25th, and 26th COUNTS OF THE INDICTMENT.

The Indictment accused the appellant in the 24th, 25th and 26th counts of evading income taxes for the calendar years 1972, 1973 and 1974 in violation of section 7201 of Title 26 of the United States Code. (App. pp. 4-7).

Sections 7201 and 7203 of Title 26 of the United States Code both apply to income tax violations and the lesser included offense doctrine applies to these statutes in an appropriate case (Spies v. United States 317 U.S. 492, 495, 87 L. Ed. 418, 421, 63 S. Ct. 364 and Sansone v. United States, 380 U. S. 343, 13 L. Ed. 2d 882, 85 S. Ct. 1004). The question at issue in the present appeal is whether this is an appropriate case for the application of the lesser included offense doctrine. The Trial Court held that it did not relying upon the Sansone case and the decision of the United States Supreme Court in Bishop (United States v. Bishop, 412 U.S. 346, 36 L. Ed. 2d 941, 93 S. Ct. 2008 and see App. pp. 61-65 and App. pp. 66-69).

It was not contested in the Trial Court that the appellant did not file income tax returns for the years in question. It was at issue in the Trial Court below as to the reasons why those tax returns were not filed. The Government contended that they were not filed through a willful intent to evade taxes by the appellant. The appellant through cross-examination of various Government witnesses, most particularly the accountant for the appellant, contended that there was no element of intent to evade taxes but rather that the information necessary for the returns was not available in order that they be prepared and filed. Consequently there was to a certain extent disputed issues of fact which could have justified the trial jury in finding the appellant not guilty of the offense under section 7201 yet guilty of the offense under section 7203 under the 24th, 25th and 26th counts of the indictment. Therefore, the Trial Court erred in refusing the request of trial counsel for the appellant that the trial jury be instructed that with regard to the 24th, 25th and 26th counts of the indictment that they could consider the lesser included offense and misdemeanor of failure to file an income tax return under section 7203 (see dissenting opinion of former Associate Justices Black and Douglas in Sansone v. United States, Supra).

POINT IV

THE TRIAL COURT ERRED IN DENYING THE APPLICATION OF THE APPELLANT FOR A MISTRIAL BASED UPON THE REMARKS OF THE GOVERNMENT ATTORNEY DURING REBUTTAL.

During the course of rebuttal remarks by the Government Attorney the following statement was made: "First of all, I would just want to say remember that what you are dealing with here is evidence in this case, evidence that you have heard from that witness stand and evidence and documents that are marked in evidence, not the imaginations of either myself or Mr. Herold with respect to what could have been said, what might have been said, what may be out there in documents some place that have not been brought into this courtroom by the defense case here." (Emphasis mine, App. pp. 70 -71). The comments of the Government Attorney with regard to evidence which the defense case did not produce is the equivalent of saying to the trial jury that the appellant had a burden of proving something and not having done so that failure to produce evidence should be considered by the jury in their deliberations as to whether the appellant was guilty or not guilty of the charges against him.

The accused in any criminal case is presumed to be

innocent and that constitutionally routed resumption of innocence must not be upset (Cool v. United States, 409 U. S. 100, 34 L. Ed. 2d 335, 93 S. Ct. 354). Additionally the Constitution requires proof of the guilt of an accused person beyond a reasonable doubt (In re Winship, 397 U. S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068).

The Government Attorney in her remarks by implying that there was something that could have been produced by the defense case acted in such a fashion as to reduce the level of proof necessary for the Government in the first place to carrry its burden. The effect of such comments by the Government Attorney was to plant in the minds of the trial jury that there was a requirement of the appellant to establish his innocence in some fashion. The Trial Court erred in denying the application of counsel for the appellant for a mistrial on these improper and prejudicial remarks of the Government Attorney.

POINT V

THE TRIAL COURT ERRED IN DENYING THE APPLICATION OF THE APPELLANT TO DISMISS THE INDICTMENT AT THE END OF THE GOVERNMENT'S CASE AND ERRED IN DENYING A SIMILAR APPLICATION TO DISMISS THE INDICTMENT NOTWITHSTANDING THE VERDICT OF GUILTY AND FOR A NEW TRIAL.

A motion was made at the close of the Government's case and subsequent to the verdict of guilty for a dismissal of the Indictment under Rule 29 of the Federal Rules of Criminal Procedure. Both the motion at the close of the Government's case and subsequent to the verdict under Rule 29 were based upon the ground that there was not sufficient evidence before the Trial Court and trial jury to either sustain a conviction, therefore, to permit the submission of the matter to the trial jury and that notwithstanding the verdict of guilty that the evidence was insufficient as a matter of law to sustain a conviction of any of the counts of the Indictment. (App. pp. 47-60; affidavit in support of motion for a Judgment of Acquittal sworn to February 18, 1977, pages 1-2 and Memorandum of Fact and Law in support of said motion at pages 1-6 as well as docket entries in App. 1-3). The principal reason why there was not sufficient evidence at the trial level to sustain a conviction of the appellant

on any of the counts in the Indictment is that there was no nexus, no connection or no tie between the monies allegedly embezzled and the appellant himself. This trial was one in which circumstantial evidence was introduced throughout the trial. The evidence of the Government however did not exclude every other hypothesis but that of guilt and consequently it was the position of trial counsel that the application at the close of the Government's case and for a judgment of acquittal notwithstanding the verdict of guilty should have been granted by the Trial Court.

A further application was made before the Trial Court that a new trial be directed pursuant to Rule 33 of the Federal Rules of Criminal Procedure. (Affidavit in support of said motion sworn to February 18, 1977 at pages 1-2; Memorandum of Fact and Law in support thereof at pages 7-10 and Docket Entries at App. 1-3). As a general rule any error in the trial which can be raised on appeal may be raised on a motion for a new trial. The motion for a new trial in the instant case was based in part upon the ground that the Trial Court erred in the following manners: (1) The Trial Court

erred in denying the motion of the appellant for an acquittal made at the conclusion of the evidence; (2) the Trial Court erred in admitting testimony concerning a prior criminal act by the appellant and (3) the Trial Court erred in refusing to instruct or charge the trial jury as to the lesser included offense and misdemeanor of failure to file an income tax return in violation of Title 26 of the United States Code at section 7203. Inasmuch as it is the position of the appellant that these rulings of the Trial Court were prejudicial errors as to him, the Trial Court should have granted the application for a new trial under Rule 33 of the Federal Rules of Criminal Procedure.

CONCLUSION

IT IS RESPECTFULLY REQUESTED THAT THIS COURT, ON THE BASIS OF THE ERRORS RECITED ABOVE, REVERSE THE CONVICTION OF THE APPELLANT HEREIN AND DIRECT THAT A NEW TRIAL OF THE APPELLANT TAKE PLACE IN THE DISTRICT COURT.

Respectfully submitted,

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